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BY FACSIMILE AND HAND DELIVERY

Honorable Karen Getman, Chair
Honorable Gordana Swanson, Commissioner
Honorable Thomas Knox, Commissioner
Honorable Sheridan Downey, Commissioner
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento CA 95814

Re: Proposed Emergency Regulation 18530.2

Dear Chairman and Members:

This is to respectfully request the Commission to reject proposed Emergency Regulation 18530.2 or at a minimum continue the matter for further study and comment.

General Grounds of Opposition

The proposed regulation is inconsistent with the statute and the case law (including the *SEIU v. FPPC* decision that is erroneously cited as supporting the regulation), and would make it virtually impossible for any potential donor to know with any confidence whether the donor could make a contribution to a candidate to whom the donor had contributed before January 1, 2001, when Proposition 34 became effective. Moreover, there is no basis whatsoever for the proposal to deduct from otherwise-unallocable transfers the amounts that may have been expended by the candidate's committee since January 1, 2001, regardless of the receipt of additional contributions. This language directly conflicts with subdivision (a) of Government Code section 85306.

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1. Proposed regulation conflicts with Government Code section 85306

The proposed regulation plainly is at odds with Government Code section 85306, which fairly read broadly permits, and does not prohibit, the transfer of campaign funds held by a candidate as of January 1, 2001 or November 6, 2002, as applicable.

Government Code section 85306 contains no restriction upon when, or in what circumstances, funds held by the candidate as of January 1, 2001 or November 6, 2002, may be transferred. The staff memorandum implies from legislative "silence" a negative effect or an unresolved question. This reverses the normal presumption that unless expressly limited, no implied limitation will be recognized, particularly where potential criminal enforcement may occur. Government Code Section 91000.

While the Commission has the authority to issue interpretive regulations under the Political Reform Act and the *Californians for Political Reform v. FPPC* decision, we do not believe this authority extends to enacting new prohibitions not contained in the statute.

Thus, in our view, there is no basis for either Option A or B of subdivisions (a) and (b) of the proposed regulation.

Moreover, there is no basis whatsoever for the proposal to deduct from otherwise-unallocable transfers the amounts that may have been expended by the candidate's committee since January 1, 2001, regardless of the receipt of additional contributions. This language directly conflicts with subdivision (a) of Government Code section 85306, which provides a limited attribution according to a "last in, first out" or "first in, first out" basis, and does not mention any "deductions." Nor may the statute fairly be implied to permit this.

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2. ***SEIU v. FPPC* does not support, but undercuts, the proposed regulation**

The staff's memorandum in support of its preferred versions of the regulation cites the *SEIU v. FPPC* preliminary injunction decision to support its position. However, that *SEIU v. FPPC* decision struck down the "intra-candidate transfer ban" of former Proposition 73, Government Code Section 85304, which prohibited intra-candidate transfers such as those permitted by Proposition 34, Government Code Section 85306. In our view, the cited decision viewed the "intra-candidate transfer ban" as an unconstitutional expenditure limitation, and the ban as inhibiting political speech. The court's conclusion rested on a common sense observation that funds not transferred would be relegated to use for purposes other than campaigns and speech. Similarly here, the application of the staff's preferred option would subordinate speech to other, non-political uses of the funds.

3. **How will attribution work under the proposed regulation?**

Option A of the proposed regulation would provide for a "one time" transfer without attribution. This raises several questions the draft regulation does not answer. First, to whom is the one-time transfer attributed upon a subsequent transfer? Is it the candidate's former committee that transferred the funds? If so, how is the subsequent attribution to be handled? Is the amount that may be attributed and used by the second transferee committee limited to the amount any person may contribute to a committee (i.e., $3,200, $5,300, $21,200?) If so, and a substantial amount may not be attributed, we submit this would constitute an "expenditure limit" ruled unconstitutional in comparable circumstances in *SEIU v. FPPC*. Second, if the attributed donor(s) rather are the pre-2001 donors to the candidate's pre-Proposition 34 committee, this poses other problems. For example, since the candidate would have to attribute funds transferred from post-2001 donors, for example donors to a 2002 election for a different office where the candidate possessed surplus funds from that election, as well as to attribute to pre-2001 donors, the potential for "double attribution" to one donor of different contributions is likely. But the regulation establishes no limiting principle.

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Option B on the other hand punishes candidates who attempted to comply with Proposition 34 by transferring such funds to a post-2001 election committee without attribution. Candidates who, intentionally or by omission, failed to transfer such funds, wind up with a comparative windfall: no attribution in comparable circumstances. The Option B "uncommingled" provision results in the same type of "post facto" windfall to such candidates.

4. Adoption of the statute will "chill" contributions by potential donors

We would like to point out another, perhaps unremarked problem: the proposed Emergency Regulation will make it virtually impossible for any donor to contribute with confidence to any candidate to whom the donor had contributed prior to January 1, 2001 or November 5, 2002, as applicable. This adds to the already-extant confusion among donors about whether they can make contributions in limited or unlimited amounts, and whether they can contribute at all, to candidates who had open campaign committees, with existing funds, as of January 1, 2001.

The regulation provides no comfort or "safe harbor" for such potential donors who need assurances that they are making lawful contributions under such circumstances. The reasons for these concerns are as follows:

If the candidate now is required to attribute such a contribution that is transferred to the candidate's committee for election to another office, a donor or potential donor would have no information about the candidate's attribution, unless and until the candidate disclosed the facts of this attribution to the donor, or unless and until the donor is able to identify the attributed contribution on the candidate's disclosure reports.
This is extremely burdensome to donors, and many will simply avoid making any contributions until they can assure themselves of whether, and how much, they can lawfully contribute.

Further, the proposed regulation contains no requirement of candidate notification of donors, no method of determining what pre-Proposition 34 contributions must be counted,

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and similar provisions that would facilitate the making of lawful contributions. Nor does the proposed regulation address what would happen in the event the donor made a contribution to a committee of the candidate prior to the candidate's transfer (and attribution) of a prior contribution to the donor. Nor does the regulation address whether the donor is required to treat the contribution as one "made" during the current year or election for purposes of recipient committee or major donor campaign committee reporting purposes.

For all these reasons, we respectfully urge the Commission not to adopt the proposed Emergency Regulation. This subject requires, at the very least, additional "ventilation," to avoid the confusion that ensued when the Commission adopted Regulation 18531.6 in 2001 and Regulation 18531.7 in 2002.

Very truly yours,

Charles H. Bell, Jr.

Ben Davidian

CHB:sa